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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 612

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

vs.

PENNSYLVANIA WATER AND POWER COMPANY
AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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of Maryland.

Baltimore, Maryland,
February 23, 1952.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Public Service Commission of Maryland (hereinafter called the "Maryland Commission") prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit dated January 3, 1952 (R. 231) which affirmed a summary declaratory judgment of the United States District Court for the District of Maryland dated May 21, 1951 (R. 1-2).

This judgment declared invalid on its face a long-term contract by Safe Harbor Water Power Corporation (hereinafter called "Safe Harbor") for the wholesale sale in interstate commerce of its entire output of hydroelectric

power and energy to Pennsylvania Water & Power Company (hereinafter called "Penn Water") and Consolidated Gas Electric Light and Power Company of Baltimore (hereinafter called "Consolidated"), the cooperation of the latter companies having made possible the Safe Harbor project. This contract (hereinafter called the "Safe Harbor contract"), consisting of an original agreement dated June 1, 1931, and two supplements of August 1, 1932 and November 22, 1939, appears in the Record, pages 91-112. Generally, it provides that Safe Harbor shall sell its entire output of hydroelectric power and energy to Penn Water and Consolidated for a period of fifty years, dating from June 1, 1931, in proportions of one-third to Penn Water and two-thirds to Consolidated, thus conforming to the proportion of stock ownership of Safe Harbor by those two companies in their jointly created Safe Harbor project.

OPINIONS BELOW

The Opinion of the District Court, Record 3-9, is reported in 97 F. Supp. 952. The Opinion of the Court of Appeals for the Fourth Circuit has not yet been reported, but will be found at page 231 of the Record.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code (USC Title 28).

STATEMENT

This petition questions the correctness of a decision by the U. S. Court of Appeals for the Fourth Circuit, in affirming a *summary* declaratory judgment of the U. S. District Court. This summary judgment struck down in its entirety the Safe Harbor contract although that contract has operated successfully and in the public interest for twenty

years, and, furthermore, has been approved and prescribed as a filed tariff by the Federal Power Commission (hereinafter referred to as "FPC") in an Order affirmed by the United States Court of Appeals for the Third Circuit, with certiorari denied by the United States Supreme Court, in *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d 179, cert. denied 339 U. S. 957 (1950).

The Maryland Commission has been a party to the various Commission and Court cases concerning the rates, services, and contracts of Penn Water and Safe Harbor with Consolidated, which have been heard and decided during the past seven years.* It has actively participated in these cases because of its duty to see that the Maryland public receives its fair share, at just and reasonable rates, of the hydro power generated by the Susquehanna River. In fact, the Maryland Commission's insistence upon this premise, as a prerequisite to a proper determination of its own 1944 Rate Case against Consolidated (XXXV PSC Rep. of Md. 40; XXXVI PSC Rep. of Md. 86, 87), led our Commission to submit to the FPC the problem of the justness and reasonableness of Consolidated's payments for hydroelectric power generated by Penn Water and Safe Harbor. The proceedings before FPC, and particularly Penn Water's effort to avoid its jurisdiction, led Penn Water in those proceedings to attack Consolidated's (and indirectly the Maryland public's) right to the

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* *In the Matter of Pennsylvania Water & Power Company*, FPC Docket IT-5915, FPC Opinions 173 and 173A (1949); affirmed by the U. S. Court of Appeals for the District of Columbia, .. F. 2d .., (July 3, 1951), cert. granted February 4, 1952 (October Term 1951, Nos. 428, 429); *Safe Harbor Water Power v. Federal Power Commission*, 179 F. 2d 179, cert. denied 339 U. S. 957 (1950); *Consolidated G. E. L. & P. Co. of Baltimore v. Siggins et al*, 99 F. Supp. 151; *Consolidated G. E. L. & P. Co. of Baltimore, et al. v. Pennsylvania Water & Power Co., et al.*, 184 F. 2d 552, 186 F. 2d 934, cert. denied 340 U. S. 906 (1950); and the instant case.

benefit of two-thirds of the output of Safe Harbor's present plant, which continues as a major objective of Penn Water in the current proceeding.

The Maryland Commission maintained in all of these cases that Consolidated (and through it, the Maryland public) is entitled to two-thirds of the Safe Harbor output under the Safe Harbor contract and at reasonable rates to be established by FPC. We took this consistent course of action because the disputes stemmed from this Commission's original action in initiating the FPC rate cases; and, even more importantly, because the Maryland public's rightful share of the Susquehanna River hydro power is seriously jeopardized by Penn Water's repudiation of and attack upon Consolidated's rights to its contract two-thirds share of the Safe Harbor output.

The real issue goes deeper than the validation of the Safe Harbor contract. Substantially all of the hydro power generated from the Susquehanna River in Maryland goes to Pennsylvania by means of the Conowingo project. The Maryland Commission originally authorized and has continued to acquiesce in this transfer of power, from Maryland to Pennsylvania, in reliance upon the transmission of upriver power from Pennsylvania to Maryland. If the Safe Harbor contract is stricken down in these proceedings then the Maryland public's share of Susquehanna hydro power will be seriously jeopardized by a *summary judgment issued without even an opportunity for the Maryland public to present the facts of its case in Court.*

It is our Commission's duty to regulate and watch Consolidated's retail rates closely. Through prompt and direct negotiation with Consolidated, our Commission secured a 1950 reduction in Consolidated's electric retail rates as a

result of the reduction ordered by the FPC in Safe Harbor's wholesale rates, just as soon as this Court's denial of certiorari confirmed the Third Circuit's affirmance of the FPC reduction. *Safe Harbor Water Power Corp. v. F. P. C.*, 179 F. 2d 179 (1949), cert. denied 339 U. S. 957 (1950). We propose to see that the benefit of the reduction ordered by the FPC in the Penn Water rate case is similarly enjoyed by the Maryland public, if the decision of the United States Court of Appeals for the District of Columbia becomes final through ultimate affirmance by this Court (October Term 1951, Nos. 428, 429).

As repeatedly contended by Penn Water and the Pennsylvania Public Utility Commission in their petitions for certiorari which were granted by this Court on February 4, 1952, to review the judgment of the Court of Appeals for the District of Columbia, in the cases of *Pennsylvania Water & Power Co. v. Federal Power Commission et al.* (Current Term No. 428) and *Pennsylvania Public Utility Commission v. Federal Power Commission* (Current Term No. 429), this case is closely related to those cases. In those cases, the petitioners referred to the opinion of the Court of Appeals for the Fourth Circuit herein as a primary basis for their contention of a conflict between circuits. *A fortiorari*, the conflict between circuits *explicity expressed* by the Court of Appeals in *this case* (pp. 16-22 of the Opinion, R. 244 et seq.) calls for a review of the instant decision.

This case involves an issue of great importance to the Maryland public (as well as issues of great national importance in the proper interpretation of the Federal Power Act), in that it destroys in its entirety the contractual basis of Consolidated's (and through it the Maryland public's) entitlement to two-thirds of the output of the Safe Harbor hydroelectric development on the Susquehanna River. This

development was made possible by the contract herein condemned by the Fourth Circuit, and by the fact that Consolidated furnished two-thirds of the Safe Harbor's equity capital and guaranteed its entire bonded indebtedness.

For 20 years Consolidated has guaranteed Safe Harbor's operating expenses and return, and made possible the successful marketing of its power. The Maryland public, through rates paid by it to Consolidated, has been the real underwriter. As long as Penn Water collected a handsome 7% return (or better as to its investment in its own Holtwood Project), guaranteed through Consolidated and the Maryland public, and as long as it had no adequate market for its own or Safe Harbor's power elsewhere, there was no complaint from Penn Water (or the Pennsylvania Commission, with which the contracts were on file from their inception) as to the validity of its power contracts. Only when substantial reductions in the wholesale power rates were made through orders of the FPC, did Penn Water repudiate its obligations of 20 years, through setting aside not only its own wholesale service contract to Consolidated (the Penn Water contract case—which we believe was erroneously determined) but also the wholesale service contract of Safe Harbor (herein involved).

Penn Water's basic purpose in pursuing this course has been the avoidance of FPC jurisdiction, as announced to the Fourth Circuit by its counsel in the Penn Water contract case, and as asserted in the pending litigation in Nos. 428 and 429 before this Court.

The accomplishment of this purpose will not secure more economic utilization of hydro resources or lower rates for power to the public either in Pennsylvania or in Maryland, but will, in our belief, result in considerable disadvantage to the Maryland public. The verbal reassurances of Penn

Water to the Fourth Circuit (repeated in the latter's opinion) are of little solace to the Maryland public in the light of the announced purposes of Penn Water to deny to Maryland its fair share of Safe Harbor power and to set aside the FPC rate reductions. The attack on the FPC orders in Cases Nos. 428 and 429 is largely predicated upon the Fourth Circuit's affirmance of a summary judgment herein without inquiry into the facts.

The Maryland Commission takes emphatic exception to the Fourth Circuit's *summary* invalidation of the Safe Harbor contract and the consequent denial by it of any inquiry into the facts. In this case, Penn Water has attempted to continue the synthetic picture of its operations, set up in its offers of proof in the Penn Water contract case (184 F. 2nd 552) by partial quotations from various records and documents which were not even received in evidence and which could have been controverted if they had been admitted. It seeks to create the far-fetched impression that it is a small company, being gradually strangled by a series of restrictions forced upon it by Consolidated and designed to restrain trade.

Such was never the case, as is shown by the affidavits of Robert T. Greer and Ralph L. Thomas (R. 115, 123), in the instant proceeding. On the contrary, both the Penn Water and Safe Harbor contracts were drafted to conform to plans prepared by the officers of Penn Water, and resulted in considerable (perhaps excessive) profits for Penn Water throughout the years. (See the Record before the FPC and Opinions 173 and 173A, on review in Nos. 428 and 429 now before this Court).

A brief survey of historical facts is important to an understanding of the entire picture. In 1910, construction of the Holtwood hydroelectric project was completed by Penn

Water, which was organized by a syndicate formed by John E. Aldred to revive the failing hydroelectric project begun at Holtwood, Pennsylvania, by the McCall's Ferry Power Company, then in receivership. A large outlet for hydroelectric power had to be procured to assure the success of the undertaking, and Penn Water looked primarily to the Baltimore area. Power contracts were made with Consolidated and with the United Railways & Electric Company (the Baltimore street railway system) in Baltimore. Later this service was coordinated and rendered more effective, from Penn Water's point of view, by having Consolidated take over the responsibility for the United Railways contract and enter into a long term contract in 1927 (to run for 50 years) for the purchase of hydroelectric energy from Penn Water.

All of this was facilitated by the fact that the Aldred interests had acquired voting control of Consolidated. In the meantime, Penn Water had obtained certain short-term renewable contracts for service in Pennsylvania to the Lancaster, York, and Coatesville areas (the areas now served respectively by the systems of Pennsylvania Power and Light Company, Philadelphia Electric Company, and Metropolitan Edison Company, large utility systems each as large or larger than Consolidated's).

In the years following 1927, the Safe Harbor project came to fruition. Penn Water had been acquiring upstream rights in contemplation of the possibility of a newer, larger and more modern hydroelectric plant with a possible market for a considerable block of its power through the planned electrification of the Pennsylvania Railroad. Penn Water was unable to accomplish such an objective, however, without further assurances of substantial financial assistance and of a market for the large amount of addi-

tional fluctuating hydro power that would be produced. Integration of the proposed additional run-of-the-river hydro plant with the steam generating resources of a utility such as Consolidated, or one of the large Pennsylvania systems, was essential to its success. Penn Water first unsuccessfully sought the collaboration of the several large Pennsylvania companies, but finally accomplished the Safe Harbor project through, and only through, the cooperation of Consolidated in entering into the 1931 contract which has been condemned in this case, although it has operated successfully in the public interest for twenty years.

The contract was not devised (1) to produce or effect "strangulation," as stated by the District Court and quoted by Judge Soper in the opinion which we here seek to have reviewed, or (2) as "an integral part of an illegal plan," as described by Judge Soper speaking for the Fourth Circuit. On the contrary, it was entered into as the best means of making possible the harnessing of a great natural resource for the benefit of the public, and, as recently as 1944, was described by the then president of Penn Water (Mr. Walls) in his testimony before the Federal Power Commission as follows:*

> "The result was that the fullest coordination of the facilities of Penn Water and of its customers in the interest of the economical utilization of the power potentialities of the power pool to meet most adequately the integrated requirements of the pool for the final benefit of the ultimate consumer, was not effected until the present contractual arrangements were devised in 1931.

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* Record in *Pennsylvania Water and Power Company v. Federal Power Commission, et al* (current term 428, volume 1, pages 25-26. See also similar evidence of Mr. Spaulding, now president of Penn Water, *circa* p. 69.) The surrounding and intervening testimony in that Record contains complete factual support for the above historical summary, which also is supported herein in the affidavits of Messrs. Greer and Thomas, Record, pp. 115 and 123.

"* * *

"It was not until further contractual arrangements had been made in 1931 by which Consolidated Gas' payments to Penn Water and Safe Harbor Company were placed on the basis of an annually computed lump sum, independent of the number of kilowatts and kilowatt hours, that the last contractual obstacle disappeared and the most economical result obtainable from the combined power resources could be derived."

Indeed, the opinion of the Fourth Circuit (R. 241) recognizes the nature of Safe Harbor's operations which called for the integrated power pool established by the contract. It refers to the Federal Power Commission's control thereof, and concludes: "That the plan established by Penn Water and Consolidated is operative cannot be doubted since the experience of twenty years shows that it is *practicable* and *successful*." However, the opinion then proceeds to state that FPC had not approved the entire contract or prescribed it in its entirety as a rate schedule. No justification can be devised for such a summary decision of the Fourth Circuit as to the intended scope of the FPC order in the Safe Harbor rate case—a decision flatly contrary to the very terms of the FPC order, flatly contrary to the tariff as refiled by Safe Harbor in compliance with that order, and flatly contrary to the assertions of FPC in its motion for leave to intervene (R. 220).*

* Said motion (R. 221), par. II, reads: "As will more fully appear in the brief hereby sought to be filed, the contract provisions which the Court below has undertaken to nullify as violative of the anti-trust laws, were provisions *which the commission had prescribed* in the exercise of jurisdiction conferred upon it by the Federal Power Act * * * *as part of a rate schedule* governing the sale of electric energy" by Safe Harbor to Penn Water and Consolidated.

QUESTIONS PRESENTED

1. Did the District Court and the Fourth Circuit lack jurisdiction to declare the Safe Harbor contract invalid, because that agreement in its entirety was prescribed by FPC order (with reduction of rates) and was refiled by Safe Harbor as its FPC rate tariff in compliance with said order?

Assuming arguendo the jurisdiction of the District Court:

2. Was it reversible error to strike down the Safe Harbor contract by summary declaratory judgment, when the Record presented many disputed issues of material fact?

3. Was it reversible error to issue a summary declaratory judgment that the Safe Harbor contract was invalid on its face as a *per se* violation of the Sherman Act, because it contained the provisions set forth in Articles IIIa, IV (last sentence) and XIV thereof, when petitioners denied that those provisions had ever operated or been capable of operation in the manner alleged and asserted by respondents?

4. Was it reversible error to affirm a *summary* declaratory judgment that the Safe Harbor contract was invalid on its face, on the ground (not found by the District Court) that the Safe Harbor contract formed "an integral part of an illegal plan" when there was no showing of such fact and it was denied by answer and affidavit?

5. Was it reversible error to sustain a *summary* declaratory judgment that the Safe Harbor contract violates the provisions of the Public Utility Law of Pennsylvania, which requires approval by the Pennsylvania Commission of any "transfer" by a public utility of that State of its powers and franchises when: (1) the Safe Harbor contract on its face makes no such "transfer"; (2) the record shows genuine dispute as to the material fact of whether the contract has so operated; (3) the record shows genuine dispute as to

whether the Pennsylvania Commission has approved said agreement; and (4) any State requirement of approval of such "transfer" by the Pennsylvania Commission conflicts with the paramount power of FPC over Safe Harbor as a "licensee" and "public utility" subject to FPC jurisdiction?

6. Was it reversible error to affirm a summary declaratory judgment that the Safe Harbor contract is invalid on its face as *per se* contravening the public policy and law of Pennsylvania (including the State law of *ultra vires*) when (1) the agreement does not on its face show any surrender by Safe Harbor to others of its initiative and responsibility as a utility; (2) the record shows genuine dispute as to the material fact of whether throughout the years Safe Harbor has independently met its responsibilities in this respect; and (3) the State law of Pennsylvania cannot be properly applied to condemn an agreement, which in this respect is subject to the paramount policy and law of the Federal Government as expressed in the Federal Power Act and the rulings of FPC issued thereunder?

7. Was it reversible error to affirm a *summary* declaratory judgment that the *entire* Safe Harbor contract is invalid on its face because of certain provisions contained therein, when the Record shows genuine dispute as to the material fact of the separability of those provisions, and more particularly, a definite offer to eliminate those provisions from the contract accompanied by evidence that they had never operated and would not be essential to the future operation of the agreement in the public interest?

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I.

The District Court Lacked Jurisdiction, in View of FPC Jurisdiction and the Doctrine of the "Filed Tariff". (Question 1)

We contended below and maintain here that the District Court lacked power to deal with the issues presented to it, for two reasons under well-established doctrines of administrative law of "primary jurisdiction", and "exhaustion of administrative remedies":

(1) The scope and intent of the Federal Power Act (16 U. S. C. A., Secs. 791a-825n, particularly Secs. 803h, 824a-824f) commits to FPC jurisdiction the power to deal comprehensively with restraint of trade combinations by utilities subject to that Commission's control. Therefore, the alleged violation by such utilities of the Sherman Act, through contracts or other activities subject to FPC control, may not be asserted in the first instance in the Courts, but first must be presented to FPC for its ruling, which ruling should then become controlling under the Rule of Reason, upon any appeal from such ruling to the Courts.

(2) A filed tariff constitutes the only lawful terms of service (including the manner and extent of service, as well as the charges therefor) for a "licensee" or "public utility" subject to FPC jurisdiction. It may be changed or set aside only by proper proceedings before the FPC, and may not be questioned collaterally in the first instance in Court (as is sought here by Penn Water).

The opinion of the Fourth Circuit in this case deals basically (as did its opinion in the Penn Water contract case) only with the first of these reasons. As to that reason, the

Court puts itself squarely in conflict with two decisions of the Court of Appeals for the District of Columbia and a decision of the District Court for the Middle District of Pennsylvania.

Pennsylvania Water and Power Company, et al. v. F. P. C., (July 3, 1951), ... Fed. (2d) ...., cert. granted, February 4, 1952, Nos. 428, 429;

S. S. W. Inc. v. Air Transport Assoc. of America, et al., (July 12, 1951), ... Fed. (2d) ...., cert. requested, February 2, 1952, No. 568;

Consolidated Gas Electric Light and Power Company of Balto. v. Siggins, et al., (August 7, 1951), 99 F. Supp. 151.

And see also:

Interstate Natural Gas Co. v. Southern Calif. Gas Co., (U. S. D. C., S. Calif., Jan. 29, 1952) 20 L. W. 2341.

The first of these was the Penn Water rate case appeal. In that case, Penn Water, departing from its prior protestations that FPC jurisdiction was not involved in the Fourth Circuit's action, insisted (and now in No. 428 insists to this Court) that the FPC orders should be set aside because of the Fourth Circuit's decision annulling the Penn Water contract and also its decision in the instant case annulling the Safe Harbor contract. The Court of Appeals for the District of Columbia affirmed the Commission's orders in their entirety, ruling that they could be changed only by proper proceedings under the Federal Power Act before FPC. The Court further held that the arrangements between Penn Water and Consolidated, which had received FPC approval, were lawful and would continue as tariffs, reasoning that operations which had FPC approval would be lawful even though certain provisions of contracts relating to such operations otherwise might fall within the ban of the Sherman Act.

This Court has granted certiorari to review the above decision of the Court of Appeals for the District of Columbia, upon petitions which vigorously asserted that the instant opinion creates a conflict of circuits which should be resolved. We respectfully submit that this case should be called up for joint review with cases Nos. 428 and 429, as a related action. Otherwise this case, by denial of certiorari, would be permitted to become *res judicata* between the parties upon a principle of law which may be found to be erroneous in the above cases, in which certiorari has been granted.

In denying the second of the reasons for lack of jurisdiction in the Courts below to hear this case, (i.e. the doctrine of the "Filed Tariff"), the Fourth Circuit places itself not only in controversy with the decisions above referred to, but also with the Third Circuit and others. The Safe Harbor contract has not only been filed with FPC as a tariff, but it has been refiled in pursuance of an order of that Commission changing only the rates and charges thereunder. This order was affirmed by the United States Court of Appeals for the Third Circuit in the Safe Harbor rate case, 179 Fed. 2d 179, cert. den. 339 U. S. 957 (1950). It cannot, under the doctrines of many cases, be attacked collaterally in this proceeding. *Northwestern Pub. Ser. Co. v. Montana-Dakota Utilities Co.*, 181 F. 2d 19, 22-23 (8th Cir. 1950), and cases cited therein, affirmed on other grounds, 341 U. S. 246 (1951).

To permit such an attack is to misconstrue the basic authority upon which the Fourth Circuit relied in the earlier Penn Water contract case, 184 F. 2d 552 (1950), and in its opinion herein. In the Penn Water contract case, as in the opinion below, the Fourth Circuit relied upon the decision in *Georgia v. Pennsylvania R.R. Co.*, 324 U. S. 439

(1945), as emphasizing that "railroad carriers are subject to the anti-trust laws although their rates are controlled by the Interstate Commerce Commission". Our position does not urge exemption of Safe Harbor from the anti-trust laws, but we do urge that if the application of the anti-trust laws involves a suit in the nature of a collateral attack on a filed tariff, as here, asking that it be declared null and void, then such attack must be denied except when made in the first instance before the proper Commission. By a 5-4 decision in the *Georgia* case, this Court allowed a suit by the State of Georgia to *enjoin a conspiracy in restraint of trade* by a group of railroads, but was careful to recognize and affirm the doctrines herein urged and to point out that *the case did not involve any attempt to annul a tariff*. The Court clearly recognized that an attempt to annul or set aside a tariff would fail. Referring to *North Dakota ex rel. Lemke v. Chicago & N. W. R. Co.*, 257 U. S. 485 (1922) and *Texas v. I. C. C.*, 258 U. S. 158 (1922), this Court stated in the *Georgia* case (p. 454):

> "It is clear that a suit could not be maintained here to review, annul, or set aside an order of the Interstate Commerce Commission. *Congress has prescribed the method of obtaining that relief. It is exclusive of all other remedies, including a suit by a State in this Court.* * * *" (Emphasis supplied.)

And, after referring to and quoting *Central Transfer Co. v. Terminal R.R. Assoc.*, 288 U. S. 469 (1933), which likewise involved application of the "primary jurisdiction" doctrine as explicitly embodied in the Clayton Act, this Court (p. 455), in referring back to all of these cases, continued:

> "* * * *We adhere to these decisions.* But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.
>
> "The relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Georgia in

this proceeding is not seeking an injunction against the continuance of any tariff; *nor does she seek to have any tariff provisions cancelled.*" (Emphasis supplied.)

Thus, the clearly expressed opinion of this Court in the *Georgia* case was that if the suit had been filed to annul a tariff provision, without first taking the matter to the Interstate Commerce Commission, it would have been disallowed; although, the Court (by a narrow 5-4 margin) was willing to *enjoin* a combination where the order did not directly affect any filed tariffs. It is submitted that the *Georgia* case does not support the decision below; but if such a construction is possible, it should be limited and clarified by this Court in a reversal of the Fourth Circuit in this case.

The Fourth Circuit has also relied upon the cases of *U. S. Alkali Ass'n. v. U. S.*, 325 U. S. 196 and *U. S. v. Borden Co.*, 308 U. S. 188. Those cases are clearly distinguishable from the case at bar. In the first place, they were both cases brought by the *Government*, through the Department of Justice, which in bringing such suits, inferentially represents the policy of the Government in support of all of its statutes. There is a clear difference between a suit by the Government (there involved) and that of a private corporation (here involved), which is seeking private advantage by repudiation of an agreement to which it was a party and which it has accepted as a tariff for many years.

In that respect, the cases of *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, *Terminal Warehouse Co. v. Penn. R. R. Co.*, 297 U. S. 500, and *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), are the decisions of this Court which are applicable to the present case. In those cases, the Courts emphasized that private parties must exhaust their relief before the appropriate administrative board, before attacking in Court an arrangement on file as a tariff. As stated

above, this principle is not restricted to rates — it must apply to rates in relation to service, and contracts affecting such service and rates. (See *Montana-Dakota* case, *Pennsylvania Water and Power Co. v. F. P. C., supra,* and 16 U. S. C. A. Sec. 824d, 824e (a)).

Furthermore, in each of the above cases which are relied on by the Fourth Circuit, there had been only inaction by the regulatory agency asserted to have power to act. There was no finding or holding that, if the appropriate regulatory agency *had acted* (as it has in this case) even the Government would have been sustained in its suit.

Moreover, it was made clear in each case that the administrative agencies involved did not have authority to deal conclusively, if at all, with the matters before the Court: (1) in the *Alkali* case the agency's power to deal conclusively with the subject matter was questioned (325 U. S. 196, 205 and 210) and (2) in the *Borden* case (308 U. S. 188, 204-205) the agency's power to deal at all with the subject matter was questioned. In the latter case, the Court pointed out that the applicable administrative authority under the Capper-Volstead Act related to certain *"producers"* of agricultural products and their rights to combine with *each other,* and concluded that this did not cover "combination or conspiracy with *other persons* in restraint of trade". This was the situation also in *Hinton v. Columbia River Packers Ass'n.,* 131 F. 2d 88 (1942).

In other words, all of those cases were suits by the Government, and involved subject matter which was found to be outside of the authority conferred on the administrative agency involved: i.e., they were conspiracies and combinations which concerned persons and subject matter *over which the agency involved had no control* — and hence there *was no* administrative remedy to exhaust.

In the instant case, the suit is *not* at the instance of the Federal Government. In addition, not only are the parties and subject matter comprehended by the terms of the Federal Power Act, but the Federal Power Commission *has already acted* in an affirmative manner by approving the very contract here attacked, and ordering its refiling *in its entirety* as a tariff, subject only to a reduction in rates under an order which has been affirmed by the Court of Appeals for the Third Circuit, with certiorari denied by this Court.

The Safe Harbor 1931 contract has been on file with the Federal Power Commission practically since its inception. Since 1936, it has been on file as a tariff under the provisions of Section 205 of the Federal Power Act, 16 U. S. C. A., Sec. 824d, which provides in part as follows:

> "(c) Under such rules and regulations as the Commission may prescribe, *every public utility shall file* with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules *showing all rates and charges* for any transmission or sale subject to the jurisdiction of the Commission, and the *classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.*
>
> "(d) Unless the Commission otherwise orders, *no change shall be made* by any public utility *in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission* and the public * * *" (Emphasis supplied).

The two proceedings under which FPC has asserted control over Safe Harbor's services and rates under the Safe Harbor contract are described in Consolidated's answer herein, (R. 62-69). They need not be further described

here, other than to emphasize that the control asserted by FPC in 1944 was affirmed by the opinion of the United States Court of Appeals for the Third Circuit, *Safe Harbor Water Power Corporation v. Federal Power Commission,* 179 F. 2d 179 (1949) cert. den. 339 U. S. 957 (1950). That control went beyond a mere determination of rates. It was a determination of rates *for service under the 1931 contract* (described by the Third Circuit, in that case, as being "exemplary"), and the terms of service as established in that contract were approved by the FPC order requiring their refiling as a tariff, except for changes in rates.

One of the basic reasons for requiring exhaustion of administrative remedies before either a utility or its customers may attack a filed tariff in Court (no matter what the basis of the attack) is the assurance that the Court will then have before it not only the contentions of the parties, but the expert findings of the administrative body as to the real facts, and how the law should relate to them in the public interest. Penn Water, in this case, not only seeks to frustrate FPC orders, without the findings of that Commission being a matter of record before the Court, but in asking for a summary judgment seeks to preclude a complete presentation of evidence to the Court in support of the contentions of the parties. The decision of the Fourth Circuit, if permitted to stand, erroneously accomplishes just that result. Summary and unsupported as it is, it has become the basis of the attempt, in Nos. 428 and 429, to annul completely FPC rate orders based upon a factual record of over 25,000 pages.

We submit that the Fourth Circuit was without jurisdiction, and should have required Penn Water to exhaust its proper remedy for change of the tariff (the Safe Harbor contract) by proceedings before the Federal Power Commission, with appeal to the Courts therefrom.

II.

It was clear and reversible error for the Court of Appeals to affirm a summary judgment predicated upon conclusions of fact drawn by the District Court from plaintiff's allegations, but placed in issue by defendants' denials and averments fully supported by affidavits.

(Question 2)

A motion for summary judgment can be granted if, and only if, the pleadings, together with the affidavits, "*show* that there is no genuine issue as to *any* material fact and that the moving party is entitled to a judgment as a matter of law". F. R. C. P. Rule 56 (c); 3 Barron and Holtzhoff *Federal Practice and Procedure*, pp. 61-62, 69-71. The cases consistently hold that if there is the "slightest doubt" as to whether material facts are in dispute, summary judgment should not be granted.

In this proceeding, there are many genuine issues as to material fact which the District Court, in its Opinion granting the motion for summary judgment, implicitly or explicitly resolved in favor of Penn Water, contrary to Rule 56(c). Allegations contained in at least eighty-six separately numbered paragraphs of the complaint were denied by the answer of Consolidated (R. 36) and by the separate answer of the Maryland Commission (R. 177). Substantially all of these allegations are wholly or partially factual, and presumably they were deemed by Penn Water to be material to its case. It is obvious that at least some of them are material. It was not within the province of the Court to resolve them peremptorily upon motion for summary judgment by a *tour de force* conclusion stated at the very outset of its Opinion (R. 3):

> "* * * The instant or 3-party contract of June 1, 1931, designs a restraint violative of the Sherman Act, 15 USCA 1 et seq., and in the process breaks the

> Pennsylvania Laws *by reducing Safe Harbor Water Power Corporation from a public utility to an impotent agency of the other parties.* This conclusion is reached from an examination of the agreement in the light of the following indisputable and environing facts: that generation of electricity for wholesale is the business of each of the parties; that the geographical and relative location of their generating plants, of Penn's and Consolidated's transmission lines and inter-connection, and of the territory and patrons served by all of them, are as shown upon the map now in the record; and that the 2-party agreement, Safe Harbor's corporate papers, its certificate of convenience, the orders of the Pennsylvania Utility Commission thereon, and the pertinent statutes of that State, are as pleaded."

The italicized phrase in this very statement resolves a disputed issue of fact in favor of Penn Water. It is a complete and summary determination of fact — i.e., whether or not Safe Harbor has acted throughout the years under the independent management and control of its own Board of Directors. The same determination of undisputed fact, along with another regarding control exercised through the Operating Committee, appears later in the District Court's Opinion in greater detail (R. 8):

> "The aim of the 3-party agreement is to place the internal control of Safe Harbor in the hands of Penn Water and Consolidated. It does so not only by the restrictions of Articles III and IV but also through the Operating Committee established by Article XIV. This Article constitutes the Committee as both advisory and regulatory of Safe Harbor. The board of directors of Safe Harbor are deposed from their place of guidance and responsibility. In few, the contract destroys the corporate virility of Safe Harbor and subjugates it as a mandate of Penn Water and Consolidated, depriving Safe Harbor of the discretion and initiative

necessary to respond and be alive to its public obligations. This is intolerable under the common law and statutes of the State of Pennsylvania."

All of this was denied by the answers of Consolidated and the Maryland Commission, and by brief and argument. It is likewise refuted by the affidavit of Ralph L. Thomas (R. 152-153).

Other portions of the Opinion contain equally patent determinations of disputed issues of material fact by the Court. On the issue of potential competition, the Court said, in part (R. 3):

> " * * * That the third party, Safe Harbor, is also a latent competitor is manifest from the location of its plant in reference to Penn Water's, from the easy deliverability of its power to the customers of Consolidated, notably in the Washington area, as well as to the patrons of Penn Water, albeit at present needing the transmission lines of the latter for such purposes. * * *"

This language involves a latent determination contrary to the factual contentions of Consolidated's answer, Pars. 11, 45, 46, 47, 61 (R. 39-47, 55-57, 60) and Mr. Thomas' affidavit (R. 124-149, 152-153) that Safe Harbor sold and sells its entire output two-thirds to Consolidated and one-third to Penn Water; and furthermore, that from the beginning of the contract term, and even now, there would be no foreseeable possibility of expanding the generating capacity of the plant beyond the seven wheels originally contemplated. These later contentions emphasize that the erection of the Safe Harbor plant was not for the purpose of stifling competition. The agreement was not, and is not, a contract in restraint of trade and commerce. It is a valid contract which fosters trade and commerce.

The District Court, further on in its Opinion (R. 4) states: "As will be evident upon their discussion, the play of the restrictive covenants in the 3-party agreement reveals this contract as a futherance of the 2-party plan, extending the 2-party circumscription to the source of the Safe Harbor energy"; and still further (R. 8): "Study of the 3-party contract convinces the Court that the objectionable provisions cannot be severed from the whole; that the agreement is entire and indivisible, its covenants dependent; and that the restrictive terms are of the warp and weft of the agreement and, if taken out, the residual could not be said to represent the agreement of the parties". Again, these statements involve conclusions of fact directly contrary to: (1) the answer of Consolidated, Pars. 38 and 69 (R. 52, 61); (2) the answer of the Maryland Commission, Pars. 27, 45 (R. 180, 183); and (3) the affidavit of Mr. Thomas (R. 153-155).

Finally, the District Court draws this conclusion (R. 7-8): "The agreement in suit as plainly transgresses the laws of the State of Pennsylvania as did the 2-party contract in the Penn Water case, * * * Judge Soper's discussion of this subject fully and featly disposes of it". This conclusion clearly contains several latent determinations of fact contrary to the contentions of Consolidated, the Maryland Commission, and the affidavit of Mr. Thomas, particularly in the latent assumption that Safe Harbor in fact has business which is subject to the jurisdiction of the Pennsylvania Commission. Petitioners' position was and is that Safe Harbor sells its entire output in interstate commerce, two-thirds to Consolidated and one-third to Penn Water, and has no intrastate sales (R. 39-47, 139-140, 182-183).

This position is supported by the recent decisions of the United States Court of Appeals for the District of Columbia

in *Pennsylvania Water & Power Company, et al. v. F. P. C.*, et al., *supra*, and of the three-judge United States District Court for the Middle District of Pennsylvania, *Consolidated Gas Electric Light and Power Company, et al. v. Siggins, et al., supra*, which issued a permanent injunction against the Pennsylvania Commission's assertions of rate jurisdiction over Safe Harbor, because all of the latter's sales are in interstate commerce, two-thirds to Consolidated and one-third to Penn Water, as found by FPC. All parties to the present case were parties to each of those proceedings, and are bound by the judgments rendered therein. Restatement of Judgments, Sec. 1, 68; Restatement, Conflict of Laws, Sec. 450.

The Fourth Circuit, in affirming this summary determination, offers no justification for the patent breach of the rules related to summary judgment. It merely states its conclusion that:

> 'The contract between the three utility companies, now before us, which for convenience may be called the Safe Harbor Contract, also contains unlawful restrictions and conditions; and this appears so clearly from the provisions of the basic document and from its close connection with the contemporary invalid Penn Water Contract as to have little room for discussion" (R. 233) and "it follows as a matter of course that the three party agreement in suit must fall for the reasons set out in our earlier opinion for the invalidation of the companion contract. It is an integral part of an illegal plan which violates the federal anti-trust statutes and the public service laws of the State of Pennsylvania" (R. 237).

The basic fault of these conclusions is that they result in a *summary* condemnation of the Safe Harbor contract as being part of a far-reaching conspiracy in restraint of trade, on the assumption that there was such a finding of con-

spiracy in the Penn Water contract case. But that proceeding involved no such factual determination (it was not brought to enjoin a conspiracy), and the Fourth Circuit explicitly disavowed consideration of evidence related thereto, saying:

> "Since we reach the conclusion that the agreement is *invalid on its face,* we have not found it necessary to consider certain excluded evidence offered by Penn Water which tended to show that the purpose and effect of the agreement was to bring about an unlawful restraint of trade." (184 F. 2d 552, 560 n. 4).

In Note 8 of the Penn Water contract case Opinion (184 F. 2d 552, 564), the Fourth Circuit said:

> "Even if it should be held that the Federal Power Act requires a preliminary determination by the Federal Power Commission in order to clothe a District Court with jurisdiction to entertain a suit to revoke a license or enjoin an act of a utility in violation of the anti-trust acts, it would not necessarily follow that such a determination is necessary to give jurisdiction to the District Court in a case of this kind. The instant suit was not brought to enforce the anti-trust acts. * * *"

There was no evidence accepted in that case (and obviously none in this one) to support a finding of "conspiracy in restraint of trade" or "illegal plan," such as now becomes the basis of condemnation of the Safe Harbor contract. Those issues were not in either case. As stated in the opinion below, the Penn Water contract was condemned "on its face" only "because Articles IV and V of the basic agreement of June 1, 1931 conferred upon Consolidated the power to control: (1) the prices at which Penn Water might sell its product; (2) the extent to which Penn Water might extend its plant; (3) the territory in which Penn Water

might sell its product; and (4) the amount of backfeed energy which Penn Water must purchase from Consolidated" (R. 233). The Safe Harbor contract contains no counterpart of these Articles included in the Penn Water contract, nor anything that resembles the far-reaching effect which the Fourth Circuit ascribes to them in its Penn Water opinion.

It is respectfully submitted that there is no legal justification for the *summary* condemnation of a contract of such far-reaching importance as herein involved, which has been praised as "exemplary" by the Court of Appeals for the Third Circuit (*Safe Harbor Water Power Corporation v. FPC, supra*), which has been prescribed as a tariff by FPC and confirmed as such by the Third Circuit in the above case, which contains neither of the provisions made the basis of illegality of the Penn Water contract, and which could operate (and has operated) to accomplish its basic purposes without the inclusion of provisions designated as illegal in the opinions below.

III.

The Court of Appeals Committed Serious and Reversible Error in Finding that the Safe Harbor Contract Violates the Sherman Act and the Laws and Public Policy of Pennsylvania, Relying Only Upon Its Own Earlier Decision in the Penn Water Contract Case, and Giving the Parties No Opportunity to Show the Many Differences in Fact Between the Two Cases.

(Questions 3-6)

The Sherman Act — on the facts, the "rule of reason" sustains the contract.

That the District Court erroneously considered itself completely bound by the Penn Water contract decision is

apparent throughout its memorandum opinion (R. 3-9). In the opening sentences of its opinion, the District Court stated, "Pattern for decision here is *prescribed* by *Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light and Power Co.*" Six times in its opinion the Court explicitly relied on the supposedly controlling effect in the instant case of the Penn Water contract decision, although the many differences between the Safe Harbor contract and the Penn Water contract were not before the Fourth Circuit in that case.

The Penn Water contract was invalidated on the basis of the facts as found in that case, and the presence in it of two Articles (IV and V) which do not appear in the Safe Harbor contract. Among the material facts there found were preexisting competition between Penn Water and Consolidated in the latter's service area; sales by Penn Water to Metropolitan Edison, Pennsylvania Power and Light, and Philadelphia Electric Company, in Pennsylvania both before and after the execution of the Penn Water contract, and the receipt of most of Penn Water's revenues from those customers; charter and franchise rights of Penn Water and its subsidiary to sell to the public in Pennsylvania and Maryland both at wholesale and at retail; ownership by Penn Water and its subsidiary of a large interstate transmission system; absence of corporate relationship between Penn Water and Consolidated; ownership of both hydro and steam plants by Penn Water and feasibility of expanding the latter; and Penn Water's purchase of steam-generated "backfeed" from its three Pennsylvania customers and from Consolidated, (summarized from the Fourth Circuit's opinion, 184 F. 2d 552).

Not one of those facts, or comparable facts, are found in the instant case. Nevertheless, the Fourth Circuit affirmed

the summary judgment herein, predicating its opinion in part upon the summary of facts in its earlier opinion in the Penn Water contract case, and stating that "the Safe Harbor contract also contains unlawful restrictions and conditions; and this appears so clearly from the provisions of the basic document and from its close connection with the contemporary invalid Penn Water contract as to leave little room for discussion." (Opinion p. 4, R. 233). This summary conclusion is flatly contrary to the facts and the law as properly applied thereto.

Safe Harbor did not begin commercial operations until nine months after the execution of the Safe Harbor contract; the sale of its entire output for a long term was essential to its initial financing; after unsuccessful efforts by Penn Water to sell Safe Harbor's output to Philadelphia Electric Company and Pennsylvania Power and Light Company, Consolidated was called on to advance $9,600,000 to Safe Harbor on unsecured notes, to purchase ⅔ of Safe Harbor's output until 1980, to purchase ⅔ of its capital stock for $6,000,000, and to guarantee its entire $21,000,000 bond issue (taking an indemnity from Penn Water as to ⅓ of this latter liability). For these outlays of cash and future obligations Consolidated received only ½ of Safe Harbor's voting stock (R. 48-51). Even Penn Water's complaint (Par. 61, R. 17) avers that Consolidated was so "directed to participate". The control exercised by Penn Water over Consolidated, as claimed in the Walls letter quoted in the Greer Affidavit (R. 118) made such "direction" effective.

Safe Harbor has always sold its entire output ⅔ to Consolidated and ⅓ to Penn Water, and has always received its entire revenue from those companies in the same proportion. This fact has been established by the Third Cir-

cuit, the District of Columbia Circuit, and the Middle District of Pennsylvania in proceedings which are *res adjudicata* as to these facts (R. 39-47; 182-183; 139-140). Safe Harbor has no charter power to generate, sell, or buy steam-generated electricity. It has no charter rights outside of two small townships in Pennsylvania, no franchise rights whatsoever, no subsidiaries, no transmission lines, and has been forbidden by the Pennsylvania Public Utility Commission to sell electricity to the public at retail (R. 39; 164-171). Safe Harbor has never bought any power "backfeed" and has no need therefor, since it sells only its fluctuating run-of-river output to its two owners. There is no practicable possibility of the expansion of Safe Harbor's hydro plant (R. 56, 140-146).

The Penn Water contract was a "residual" type contract under which Consolidated had an open-end obligation to pay Penn Water its operating costs and a substantial return on Penn Water's plant, including any and all additions, without limitation, plus an open-end obligation to buy whatever power was left over after Penn Water's sales to its other customers. Consequently, the controls in that contract were made broad enough to protect Consolidated in this heavy liability. The Safe Harbor contract is not of the "residual" type. It is for the sale of specific shares (⅔ and ⅓) of a specific amount of capacity ("approximately 255,000 horsepower") and energy ("850,000,000 kwh average annual energy").

In the Penn Water contract case, the Fourth Circuit found that the restrictions in the Penn Water contract which rendered it invalid were contained in its Article IV and V. Neither of these Articles appears in the Safe Harbor contract, nor do any provisions in the latter have the same effect. Only three Articles (III(a), IV, XIV) are challenged.

The first, Article III(a) (R. 95) is not a "restriction" on Safe Harbor but an obligation *to install additional machinery or equipment,* over and above the initial development "at the request and for the benefit" of *either* Consolidated or Penn Water, and not otherwise incumbent on it. The language is affirmative, "* * * Safe Harbor Company *shall* install * * *." This additional *obligation to expand* in no wise affects Safe Harbor's unrestricted power or duty to initiate its own expansions (assuming their economic feasibility) in the absence of such an individual request from either of its two owners. This additional obligation to expand on such individual request is conditioned on the receipt by Safe Harbor, from the party making the request, of 18 months' notice before the facilities are to be completed, and the other owner's approval of an installation of additional machinery or equipment for the sole benefit of only the applicant owner. Such expansion obligation is also subject to the condition that the owner so requesting the expansion for its sole benefit shall guarantee Safe Harbor the operating expenses and return on such additional installation. This provision is assuredly a far cry from Article V of the Penn Water contract.

This same paragraph provides that as to other additions to the hydro plant, which would be made at the joint expense of the two owners, Safe Harbor will not sell its output to any other customer than its two owners (who would finance the expansion) without their consent. As noted elsewhere, all of the engineers, both Penn Water's and Consolidated's, agree that such expansion is not foreseeable (R. 141). The sale of its output is likewise not foreseeable and so is not "potential." But even if it were—wherein is competition in any way affected? This is merely an option of its two owners to purchase the output of plant additions (again assuming their feasibility). If it is proper for Safe

Harbor to sell the entire output of its plant to its two owners, as has been held by several Courts, wherein lies the vice of giving to them a similar option on the output of plant additions which they will likewise finance? If such expansion should ever occur, the two owners, to the extent regulatory laws will permit, will be in direct competition with each other (and with other utilities) in the disposition of their respective shares of the expanded output.

Article IV, "Coordination and Joint Use of Facilities," (R. 96) seeks to prevent wasteful duplication of investment and operating costs; to foster economic interchange and coordinated utilization of facilities. After a lengthy recital of such purpose, it concludes, "*For this purpose* Safe Harbor Company will not enter into other agreements with either receiving company (i.e., Penn Water or Consolidated) without the approval of the other and will take into consideration either receiving company's suggestions for the best coordinated utilization of all facilities that may be mutually beneficial". This simply forbids and is limited to any "side agreements" which would have the effect of creating wasteful duplication of investment or operating costs, or of preventing economy interchange or coordinated utilization of facilities. Such a provision is definitely in the public interest, entered into not for the purpose of restraining trade, but as part of an agreement designed to foster trade.

The final alleged restraint is under Article XIV (R. 105), which provides for an operating committee "for investigation, consultation and advice." It is given no other authority. In twenty years of operation under this contract, Safe Harbor has never been directed, requested, or ordered by the Operating Committee to take any action or refrain from any action. The only action alleged by Penn Water to have been taken by Safe Harbor under this Article was

taken by that Company only after consultation with and approval of its President and Board of Directors, involving an expenditure by Safe Harbor of only $3,000 (R. 147-148; 152-155).

These provisions have no similarity to Articles IV and V of the Penn Water contract. There is no restriction in the Safe Harbor contract as to prices, such as was held to be illegal "per se" in the Penn Water case and to eliminate application of the "rule of reason". There is here no restriction upon Safe Harbor to act upon its own initiative, and in pursuance of its charter rights to install additional generation or other equipment if it finds it desirable or necessary to do so in pursuance of its powers and duties.

For over twenty years there has never been any occasion to resort to the above described Articles in the Safe Harbor contract which have nevertheless been made the basis of its destruction (R. 147-148; 152-153). Penn Water's and Consolidated's engineers agree that the present Safe Harbor plant can utilize the entire average river flow for 312 days out of the year. It is not economically practicable to add an expensive generator that would necessarily remain idle over ten months each year. Consequently, there is no practical possibility of the claimed restraints ever becoming operative or of any significance (R. 140-146; 154).

Under these circumstances and considering the above-reviewed clear differences between the Safe Harbor and Penn Water situations, there is no rational justification for the Fourth Circuit to condemn summarily the Safe Harbor contract as being a *per se* violation of the Sherman Act. Through the Safe Harbor contract, Consolidated and Penn Water, brought into existence a new hydro plant, accomplishing a vertical integration by contract (and stock ownership) subject to the condemnation of the Sherman

Act only if it violated the "rule of reason" (*U. S. v. Terminal R. R. Association of St. Louis,* 224 U. S. 383 (1912); *Standard Oil Co. (Indiana) v. U. S.,* 283 U. S. 163 (1931); *Appalachian Coals, Inc. v. U. S.,* 288 U. S. 344 (1933); *Associated Press v. U. S.,* 326 U. S. 1 (1945); *U. S. v. Paramount Pictures,* 334 U. S. 131, 173-4 (1948); *U. S. v. Columbia Steel Co.,* 334 U. S. 495 (1948); and *U. S. v. Yellow Cab Co.,* 332 U. S. 218 (1947), 338 U. S. 338 (1949). No such violation has occurred or can be shown.

The Pennsylvania Law and Public Policy do not Apply to this Completely Interstate Situation.

The District Court was equally in error in its conclusion that the Safe Harbor contract "as plainly transgresses the laws of the State of Pennsylvania as did the two-party contract in the Penn Water case, * * * Judge Soper's discussion of this subject fully and featly disposes of it" (R. 7, 8), which conclusion was affirmed without discussion in the Fourth Circuit's opinion. In arriving at this conclusion the Court resolved sharply disputed issues of material fact which were not (and could not) have been settled by the prior case, particularly as related to whether or not *Safe Harbor* has any intrastate business subject to the jurisdiction of the Pennsylvania Commission.

The Fourth Circuit's opinion in the Penn Water contract case, resolved the issue that State jurisdiction was lacking by stating "that *Penn Water* is engaged in the production and local distribution of electrical energy to local utilities which distribute power to consumers in Pennsylvania, and in respect to this business, it seems clear that the state commission possesses regulatory power" (184 F. 2d 552, 568; emphasis supplied). This conclusion, with reference to the nature of *Penn Water's* business and the consequent jurisdic-

tion of the Pennsylvania Commission, is clearly contrary to the findings of the Federal Power Commission and the decision of the United States Court of Appeals for the District of Columbia Circuit, affirming that Commission's order made upon a full record (.... Fed. 2d ...., July 3, 1951, before this Court in Nos. 428 and 429).

However, assuming the statement is valid as to *Penn Water,* there is no doubt whatsoever that it cannot be carried over to *Safe Harbor's* situation in the instant proceeding. Petitioners contended below that Safe Harbor makes no intrastate sales subject to the jurisdiction of the Pennsylvania Commission and submitted affidavits in support thereof (R. 39-47, 139-140, 182-183). This clearly established a dispute as to material fact relating to the asserted violation of the Pennsylvania law, and public policy, which could not properly be resolved on motion for summary judgment contrary to these Petitioners' contentions.

Furthermore, the lack of jurisdiction of the Pennsylvania Commission over any of Safe Harbor's sales or services would seem to be established by several decisions involving Safe Harbor, to which the Pennsylvania Commission has been party.

Safe Harbor Water Power Corp. v. F. P. C., 179 F. 2d 179 (1949) cert. den. 339 U. S. 957 (1950);

Pennsylvania Water & Power Company, et. al. v. F. P. C., et al., ... F. 2d .... (July 3, 1951) Cert. granted Feb. 4, 1952, October Term 1951, Nos. 428, 429;

Consolidated Gas Electric Light and Power Company of Baltimore et al. v. Siggins, et al., 99 Fed. Supp. 151 (Aug. 7, 1951) — enjoining the Pennsylvania Commission from exercising jurisdiction over Safe Harbor, with no appeal taken.

We believe that the Pennsylvania Commission is bound by those determinations and that the Fourth Circuit committed clear error in not giving them (particularly the latter) their full effect under doctrines of *res judicata*. In any event, however, there is a conflict of circuits as to whether Safe Harbor is in any respect subject to the control of the Pennsylvania Commission.

IV.

There Was Clear Error in Affirming a Summary Declaratory Judgment Striking Down the Entire Safe Harbor Agreement, When the Record Shows that the Only Provisions Found to Be Objectionable Had Been Inoperative and Were Separable.

(Question 7)

The District Court, selecting language from a single case which is obviously not in point on its facts (*U. S. v. Bethlehem Steel Corp.*, 315 U. S. 289, 298), determined that the Safe Harbor contract is inseparable, its covenants dependent, and the restrictions "of the warp and weft" (R. 8). This sweeping conclusion was reached without accepting any evidence whatsoever related to such determination, and despite the fact that Consolidated had put in issue the fact of separability (Answer Par. 70F, R. 62), supported by the affidavit of Mr. Ralph L. Thomas, Vice-President and Executive Engineer of Consolidated, former General Superintendent of Penn Water, and Project Engineer of Safe Harbor from 1930 until 1942. Mr. Thomas deposed (R. 153-155):

> "Operation of the Safe Harbor plant is entirely practicable and feasible under the Safe Harbor contract alone. Such operation in the public interest is not dependent on the existence or non-existence of contracts between Penn Water and Consolidated with respect

to the sale of the output or the operation of Penn Water's plant at Holtwood.

"* * *

"* * * Because of the present high utilization of river flow by Safe Harbor and of Consolidated's interest only in its two-third share of the output of the present plant, the provisions of Article III(a) of the Safe Harbor Agreement are academic, have never been the subject of any differences or been of any significance, and could be eliminated from the Contract without any effect whatsoever on the practicable and feasible performance in the public interest of the balance of the Contract entirely free of any restraints whatsoever. The same statement applies to the last sentence in Article IV of the Contract if Penn Water objects to that."

Without one word of justification in its opinion, the Fourth Circuit affirmed the District Court in rejecting the argument of separability. Such action is not only contrary to long standing principles of contract law, but also flatly ignores the rule that summary judgment may issue only where there is no disputed issue of material fact.

The Maryland Commission calls attention to these hard, practical facts. The features of the contract found objectionable by the District Court, with the exception of the Operating Committee, have not influenced *one* kwh of electric energy in twenty years (Thomas Affidavit R. 153-155, quoted above). Nothing has taken place in twenty years which has caused these provisions to become operative. They did not influence the installation of the seventh generating unit in 1940, because the parties were committed to that in 1931. On the other hand, the remainder of the agreement has independently governed the *complete* production, sale and delivery of over 16 *billion* kwh of electric energy. It is therefore fantastic to describe the so-called

objectionable features as the "warp and weft" of the entire contract.

Consolidated is, in fact, only a stake-holder in this case. If it loses its inexpensive Safe Harbor power, it must replace it with such more expensive steam-generated power. The higher cost, as one of Consolidated's allowable operating expenses, would necessarily be passed on to the Maryland public. The avoidance of such an unjustifiable burden on Maryland consumers is the principal concern of the Maryland Commission. We submit that the prospect of higher electric rates for a half-million Maryland rate payers should be of real concern to this Court, particularly in view of the several findings of the Federal Power Commission, the United States District Court for the Middle District of Pennsylvania (99 Fed. Supp. 151), the United States Court of Appeals for the Third Circuit (179 F. 2d 179), and the United States Court of Appeals for the District of Columbia (.... F. 2d ...., before this Court in Nos. 428 and 429), in consistently sustaining Consolidated's claim to two-thirds of the entire economical output of the existing Safe Harbor plant — and after protracted hearings and arguments on detailed and voluminous factual records.

Penn Water's insistence upon striking down the entire Safe Harbor contract stands out starkly as a bold attempt to free for itself a larger share of Safe Harbor power, and also to secure a further basis for attacking the recent Federal Power Commission orders which reduced Safe Harbor's and Penn Water's hydro rates for the ultimate benefit of both the Maryland and Pennsylvania consuming public.

Whatever justification there might be (and we submit there is none) for striking down the provisions of the Safe Harbor contract found to be objectionable by the Courts

below, there was no justification whatsoever for refusing to separate them from the remainder of the contract in which no illegality has been, or can be, found.

In condemning the entire Safe Harbor contract, the Fourth Circuit has acted contrary to well-established law relating to separability of invalid provisions of contracts, including its own decision in *Paramount Famous Lasky Corp. v. National Theatre Corp.*, 49 F. 2d 64, 66 (1931), in which the Fourth Circuit stated, in part:

> "It has been expressly held that, where agreements in restraint of trade were unlawful in part, they were enforceable as to the parts that were not unlawful, and this holding runs back to the earliest authorities."

And see: *American Railway Express Co. v. Lindenberg*, 260 U. S. 584, 585 (1923); Oregon Steam Navigation Co. *v. Winsor*, 87 U. S. 64 (1873); *Western Union Tel. Co. v. Pennsylvania Co.*, 129 Fed. 849, 868 (CCA 3, 1904).

Williston on Contracts (Rev. Ed.) Sec. 1629A, p. 4459 (see also Sec. 1659) correctly summarizes the rule:

> "Thus the courts enforce the severable legal parts of an illegal divisible contract where the unlawfulness does not permeate the whole and even in the case of indivisible contracts they strive to segregate and uphold if possible such portions as may be legal."

CONCLUSION

In summary, the real question is whether this Court will permit the Fourth Circuit to uphold a collateral attack upon an FPC tariff, and in doing so, to deny Maryland its benefit from Consolidated's share in the output of the present Safe Harbor plant, by striking down Consolidated's contractual entitlement thereto without even a factual record before it.

WHEREFORE, it is respectfully submitted that the petition should be granted.

Charles D. Harris

CHARLES D. HARRIS,

General Counsel,
Public Service Commission
of Maryland.

Baltimore, Maryland,
February 23, 1952.

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Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

Nos. 611 and 612.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners,

v.

PENNSYLVANIA WATER & POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT PENNSYLVANIA WATER & POWER COMPANY IN OPPOSITION.

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